SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 425

JOSEPH MATTIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. _____

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on June 29, 1967.

Citation to Opinion Below

The opinion of the Court of Appeals is as yet unreported but is printed in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Should one conspirator be entitled to challenge the legality of a search and seizure made against a co-conspirator when the fruits of that search and seizure are used against him?

2. Should the petitioner's motion for judgment of acquittal have been granted since there was insufficient evidence of the interstate commerce element of the crime charged?

3. Should not the jury have been instructed, as requested, that a person who has no knowledge of the conspiracy but happens to act in a way which furthers some object of the conspiracy does not thereby become a conspirator?

Statute Involved

The statutory provisions involved are 62 Stat. 701 (18 U.S.C. 371) and 62 Stat. 806 (18 U.S.C. 2314 and 2315). They are printed in Appendix A.

Statement of the Case

Petitioner, Joseph Mattia, was convicted of participating in a conspiracy to transport counterfeit securities in interestate commerce. He was sentenced to three years imprisonment and fined $5,000. Petitioner, one of fourteen defendants in a six-count Indictment, was accused only on the conspiracy count. The single overt act which he was

charged with having committed was photographing, printing and counterfeiting bonds of the General Motors Acceptance Corporation (GMAC) between August 1, 1961 and December 20, 1961.

Petitioner is an employee in and manager of Mattia Pirnting Company, Newark, New Jersey. His father, Romeo Mattia, is the owner of the company. The two Mattias, together with defendants Perna, Raio, Mancinelli and Natale (these six defendants were characterized in the Indictment as "employees and representatives of the Mattia Printing Company") were all charged with the same overt act in the conspiracy (R12a). Romeo Mattia was acquitted; the other five defendants were found guilty. Of the remaining eight defendants, several had pleaded guilty, several were severed for a separate trial and one received a dismissal of the Indictment.

The Court of Appeals concluded that there was sufficient evidence to present a jury question on all the critical conspiracy elements: (1) whether the bonds were counterfeit; (2) whether the Government properly "linked" the defendants to the printing of the bonds; (3) whether the defendants were aware they were engaged in a counterfeiting operation; (4) whether there was proof of an agreement to commit an offense against the United States, i.e., whether there was an agreement among the conspirators to transport the bonds with fraudulent intent in interstate commerce.

Reasons for Granting the Writ

I. One conspirator should be entitled to challenge the legality of a search and seizure made against a co-conspirator when the fruits of that search and seizure are used against him.

Defendants Micelli and Capizzi were charged in the Indictment as co-conspirators with petitioner and the other five printing plant defendants. The overt act of which these two defendants stood accused was the possession of numerous GMAC bonds on February 13, 1962, in Newark (R13a). After the trial had commenced Capizzi retracted his not guilty plea to the conspiracy charge and pleaded guilty (R6a). The two substantive counts against him were then severed from the main case and later dismissed (R7a). On the same day on which Capizzi pleaded guilty both the substantive and conspiracy counts against Micelli were severed from the trial against the six printing plant defendants (R6a). Subsequent to the completion of the trial the Indictment against Micelli was dismissed by leave of Court (R8a).

Before the trial had begun Micelli and Capizzi had moved to suppress certain evidence claimed to have been taken in an illegal search and seizure. This motion was denied (R4a). By the time the trial had reached the point where the Government was offering evidence of the results of the Micelli-Capizzi search, those defendants, as noted above, were no longer in the case. As soon as Captain Manghisi, the police officer who conducted the search, was sworn, petitioner's counsel made the following objection which the Court immediately denied because of a lack of "standing" (R165a):

"Your Honor, I recognize the witness' name as being a member of the Newark Police Department. I understand that sometime in February, 1962, he entered into an apartment with a search warrant, and during the course of the search, while they had a search warrant to search for gambling paraphernalia, during the search, they uncovered certain bonds, which I assume that the Government is going to attempt to introduce into evidence.

"The apartment was Micelli's apartment, the defendant who is no longer in the case, and I believe Capizzi was also present.

"In discussing this matter with Mr. Querques [counsel for Micelli and Capizzi], he indicated to me that when this point in the trial did arrive, he was going to move that the evidence be suppressed on the ground that it was obtained in an illegal search. He is no longer in this case.

"I think the theory of the Government is that our clients are co-conspirators, and so certainly for this purpose, I urge—I don't know of any authority for this, your Honor, except that I am arguing it—we should stand in the shoes of a co-conspirator, since if Mr. Querques were here, he could move against the entry of this evidence, and he is not here today at this trial, so therefore, unless we are afforded that opportunity, we could not even raise it, we would not have the status, so if he were here—

"The Court: Unfortunately, I don't think that your clients have status to question the legality of the search and seizure, if any, and therefore, if you are now voicing a motion to suppress, I am denying the motion."

The petitioner's attorney renewed this motion later in the case but the Court again denied it (R181a).

Captain Manghisi testified that, on February 13, 1962, he and several other police officers were conducting a surveillance of Micelli's Newark apartment. One of the other officers, Detective Poshywak, later testified that the purpose of this investigation and surveillance was "in regard to a possible gambling operation" (R183a). Manghisi saw Micelli and Capizzi enter the apartment, the latter carrying two suitcases. The police went to the adjoining apartment where Poshywak placed his ear to the wall and overheard a conversation between the two defendants. (The record suggests that the police were in the adjoining apartment for at least one hour.) This conversation was to the effect, "We'll make them in stacks of twenties. They go to California. They liked them in series" (R185a).

Manghisi said that this eavesdropping led him to believe "we were onto counterfeiting, because of some information I had about Micelli" (R172a). The police waited until the two defendants left the apartment, each carrying a suitcase, and then apprehended them. They all went into Micelli's apartment where the police insisted that the suitcases be opened. Micelli resisted at first, claiming they contained personal belongings. Eventually the key was produced, the suitcases were unlocked and GMAC bonds were found inside. The Government later produced a considerable amount of evidence which tended to indicate that the seized bonds had been printed at the Mattia Company by the petitioner, among others.

Needless to say, the bonds seized at Micelli's apartment and the testimony incident thereto were both prejudicial to the petitioner. The Court's outright refusal to entertain a motion to suppress, on the grounds that the petitioner

lacked standing, raises serious constitutional law questions about the scope and effect of an accused co-conspirator's rights under the Fourth Amendment, the due process clause of the Fifth Amendment and Rule 41(e)[1] of the Federal Rules of Criminal Procedure.

In *Jones* v. *United States*, 362 U. S. 257, 261 (1960), this Court held that, to qualify as a person "aggrieved" by an unlawful search and seizure within the meaning of Rule 41(e), "one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." This Court rejected the then

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[1] Rule 41(e) provides:

> "(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the court in its discretion may entertain the motion at the trial or hearing."

prevailing lower court view that the moving party must have had some interest in the seized goods within the meaning of the law of private property. Instead, it held that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U. S. 267.

Less than one month ago the Court of Appeals for the Second Circuit came to grips with a relevant and important search and seizure "standing" question. In *United States ex rel. DeForte* v. *Mancusi*, —— F. 2d —— (2 Cir. 1967), a *habeas corpus* proceeding, the Court held that a union official who had been convicted of conspiracy and extortion did have standing to object to the use against him in a criminal prosecution of union books and records which were taken during a search conducted against the union. The *DeForte* opinion relied heavily on *Jones* and noted how it had "dramatically liberalized the standing requirement for challenging the legality of searches and seizures." But of more immediate concern is the Court of Appeals' recognition that in *Jones*,

> ". . . the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what is required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for efficient and vigorous police protection. It appears that a proper balance can only be struck on a 'case-by-case basis'."

Under all the facts presented below it is clear that the petitioner was a true "victim" of the Micelli-Capizzi search

and seizure, as well as one against whom that search was "directed". Conspiracy has been described as a "partnership in crime"; the overt act of one conspirator is the overt act of all the other conspirators. *Pinkerton* v. *United States*, 328 U. S. 640, 646 (1946); *United States* v. *Vittoria*, 284 F. 2d 451, 454 (7 Cir. 1960). Accordingly, evidence about the bonds seized from Micelli and Capizzi—the possession of which was their overt act in the conspiracy—was unhesitatingly introduced by the Government as part of the brick and mortar of the conspiracy case against the petitioner. This alter ego theory, however, appears to have been a one-way street; it permitted evidence against one to be introduced against all, but shackled one conspirator from arguing a constitutionally guaranteed right simply because his "siamese twin" had pleaded guilty or had been granted a separate trial. Certainly Micelli and Capizzi would have raised the point if they were still in the case. Fairness demands that if conspirators are to stand in each other's shoes for purposes of incrimination and inculpation they should occupy the same position for purposes of exculpation. Petitioner's motion should have been heard. Certainly, the seizure of property, without a warrant, over the protest of Micelli, from a locked suitcase—all brought about as the result of a long period of eavesdropping—was not a matter of insignificant constitutional dimension.

In his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 449 (1949), Mr. Justice Jackson called attention to the fact that "the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought whenever it is sought to extend the doctrine to meet the exigencies of a particular case." After characterizing consipracy as "a scatter gun to bring down the defendant", he emphasized that (335 U. S. 453):

> "As a practical matter, the accused often is confronted with a hodgepodge of facts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed."

In view of the particular problems a conspiracy case involves and the lowering of evidentiary barriers to permit evidence obtained from one conspirator to be used against another, do not fundamental fairness and due process demand that the aggrieved conspirator be permitted to step forward and at least have the constitutional law objection heard on its merits?

A final word should be added about the procedural propriety and timeliness of the motion made below by the petitioner. If, on the one hand, his motion is considered but a continuation or outgrowth of Micelli and Capizzi's pretrial motion, it certainly was made within time and in proper fashion. See Rule 41(e). On the other hand, if it is considered an "original" motion, brought on for the first time during the course of the trial, no problem arises. Rule 41(e) permits the Court, in its discretion, to entertain the motion at trial. In this case the Court never actually "entertained" the motion; rather, it refused to hear it because of petitioner's lack of "standing". Moreover, *Jones* holds that the provision of Rule 41(e) that the motion be made before trial is "not a rigid one" . . . "we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. 362 U. S. 264.

II. The petitioner's motion for judgment of acquittal should have been granted since there was insufficient evidence to present a jury question on the "interstate commerce" element of the crime charged.

The Court of Appeals acknowledged that there was no "direct" proof (A11a) that the petitioner and other printing plant defendants intended that the bonds be transported in interstate commerce. Rather, the Court seems to have held that this element of the crime had been proven by "inference" (A11a).

It is fundamental that a conviction for conspiracy under 18 U. S. C. 371 cannot be sustained unless there is proof of an agreement to commit an offense against the United States. *Ingram* v. *United States,* 360 U. S. 672 (1959). In this case that would amount to proof that the petitioner knew that the bonds would be transported in interstate commerce. Unless the Government proved by clear and unequivocal evidence that petitioner had this knowledge, no inference could be drawn that he had the requisite intent. As this Court held in *Direct Sales* v. *United States,* 319 U. S. 703, 711 (1943):

> "This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent connot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

A frank review of the evidence indicates that there were only three possible areas of proof from which petitioner could have been charged with knowledge that the bonds were to be transported in interstate commerce. The first two were cited by the Court of Appeals (A11a); (1) the bonds provided they were to be paid upon maturity in New York thus permitting an inference that the defendants were aware "that at some point they might be expected to become a part of interstate commerce"; (2) the operations of GMAC were of an "evident interstate nature". The third would be that petitioner and Sagal (sic: Segal), a co-conspirator who did participate in the interstate transportation of some bonds, had had a conversation in Newark before any GMAC bonds were printed.

The attempt to base petitioner's knowledge and intent upon the "maturity" wording of the bonds is a striking example of what *Direct Sales* condemned. This would require the jury to have inferred that petitioner worked on the bonds after the "maturity" wording had been placed on them, then to have inferred that he saw and read that wording, and then to have inferred that the petitioner realized at that point that the bonds, in the words of the Court of Appeals, "might be expected to become a part of interstate commerce" (A11a). Clearly this was "piling inference upon inference", not the clear and unequivocal proof of the interstate element of the conspiracy which *Direct Sales* requires. One who, without more, furnishes supplies to someone commiting a federal crime is not guilty of the conspiracy to which the other person is a party but of which the supplier had no knowledge. *Cf. United States* v. *Falcone*, 311 U. S. 205, 211 (1940).

Ingram supports the position that the "maturity" wording cannot be enough to convert the crime charged from a possible offense under New Jersey law to a federal crime.

In that case petitioners Smith and Law were involved in a gambling operation which was illegal under Georgia law. The evidence against them and others "established in intricate detail that the participants in this large-scale enterprise had, through a variety of carefully planned strategems, made every effort to conceal its operation." 360 U. S. 674. Nevertheless, the convictions of Smith and Law for conspiracy to evade and defeat the payment of the federal taxes imposed on lottery operations were reversed. There was no proof that Smith and Law were aware that two of their co-conspirators were liable for payment of tax because of the gambling operation. This Court held (360 U. S. 678-680):

> "The record is completely barren of any direct evidence of such knowledge . . . The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law. These circumstances were simply the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly, and their apparent knowledge that it was conducted at a profit.
>
> * * *
>
> "Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law and that their superiors owed federal wagering taxes. Certainly the secrecy of the operations did not go to show that knowledge. This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted . . . . Evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and

that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them is not evidence that they did not know of them."

The Court of Appeals had to pile inference on inference just to hold that the petitioner was aware that the bonds "might" pass in interstate commerce. Yet *Ingram*, perceiving that the Government was trying to make a federal crime out of a local offense, refused to accept all the "mights", "coulds" and other inferences on which the prosecution had to rely. This case is essentially no different than *Ingram*. The "maturity" wording was far from the required clear and unequivocal proof.

The second element of interstate commerce evidence was said to be the fact that GMAC's operations were of an "evident interstate nature". This is hardly sufficient to bring the case within the Commerce Clause. If it was, every counterfeiting of securities of any business with interstate operations would qualify as a federal crime. This was never intended by Congress when it enacted 18 U. S. C. 2314 and 2315.

The third possible interstate commerce point might be said to be found in the conversation petitioner and Sagal had in September, 1961. The Government's only witness to this conversation was Adler, a paid informer, who admitted he did not hear what was said. This conversation was the only link between petitioner and any of the defendants involved with the actual transportation of bonds. But a conspiracy may not be inferred from mere association. *United States* v. *Hickey*, 360 F. 2d 127, 139 (7 Cir. 1966). Nor are presumptions of guilt of conspiracy lightly to be indulged from mere meetings. *United States* v. *Di Re*, 332 U. S. 581, 593 (1948). This single meeting between the two men, therefore, hardly qualifies as the indispensable interstate commerce link.

III. The trial court should have charged the jury that a person who has no knowledge of the conspiracy, but happens to act in a way which furthers some object of the conspiracy, does not thereby become a conspirator.

The petitioner offered the following request to charge:

> "Although one may become a member of a conspiracy without full knowledge of all the details of the conspiracy, a person who has no knowledge of the conspiracy, but happens to act in a way which furthers some object of the conspiracy does not thereby become a conspirator."

The trial court refused to deliver this charge stating that it had been given in the main charge. The Court of Appeals held that the "substance" of the request had been given and pointed to the following excerpts from the main charge (A13a):

> "If the parties acted together to accomplish something unlawful a conspiracy is shown."
>
> "In every conspiracy there must be proof beyond a reasonable doubt that the persons named therein did knowingly participate and knowingly commit some act in furtherance of the conspiracy."

The failure to deliver the requested charges raises an important question of federal law: should not a defendant in a conspiracy case be entitled to a full and accurate charge about the exculpatory factors related to conspiracy. The request to charge was a correct statement of the law. See *United States* v. *Falcone, supra.* Furthermore, a defendant in a criminal case is entitled to have instructions presented

to the jury relating to a theory of defense for which there is any foundation. This is true even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. *Tatum* v. *United States*, 190 F. 2d 612, 617 (D. C. Cir. 1951).

The requested charge dealt with a defense which the petitioner was entitled to have the jury rule upon: a party who innocently furthers a conspiracy to violate federal law does not thereby become a conspirator. The instructions which were given to the jury did not present this basic defense in any succinct form, certainly not in a framework at all similar to the request. At best the jury would have been forced to put together fragments of the charge and even then the full statement of the defense would still not have been before them.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK B. LACEY,
Counsel for Petitioner.

July 26, 1967

APPENDIX A

Statutes

18 UNITED STATES CODE § 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 UNITED STATES CODE § 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be trans-

ported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, § 2, 75 Stat. 802.

18 UNITED STATES CODE § 2315. *Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps*

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise,

or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub. L. 87-371, § 3, 75 Stat. 802.

APPENDIX B

Opinion and Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15810, 15811, 15812, 15813, 15845

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MATTIA, GERARD A. PERNA, JOHN RAIO, FRANK MANCINELLI and DOMINICK J. NATALE,

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 1, 1967
Before McLAUGHLIN, HASTIE and SEITZ, Circuit Judges.

OPINION OF THE COURT

(Filed—June 29, 1967)

By SEITZ, *Circuit Judge.*

The five appellants ("defendants") appeal their conviction by a jury of participation in a conspiracy to trans-

port counterfeit securities in interstate commerce. Several other individuals pleaded guilty.

These defendants were convicted on the count in the indictment which alleged that they and others conspired[1] to commit violations of 18 U.S.C. §§ 2314 and 2315 by possessing, receiving and transporting in interstate commerce counterfeit General Motors Acceptance Corporation bonds. They were alleged to have engaged in the overt acts of photographing, printing and counterfeiting 3,000 twenty-one year 5% 1980 GMAC bonds each in the amount of $1,000. Such acts allegedly took place between August 1, 1961 and December 20, 1961 at the Mattia Printing Company ("Company") plant in Newark, New Jersey. It was also charged that defendants acted as "representatives" and "employees" of the Company.

The Government established at the trial that Leo Segal[2] was one of certain individuals who retained a Florida attorney during the first week of January, 1962 to negotiate a $250,000 loan with a Florida bank to be secured by $300,000 worth of GMAC bonds. After submitting the serial numbers and the bonds at the Bank's request, Segal later advised the attorney he had found another source for the loan and withdrew the bonds. Shortly thereafter two of the non-appealing defendants were arrested in New Jersey with some of the counterfeit bonds in their possession. After further investigation indictments were obtained and thereafter these defendants were brought to trial and convicted.

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[1] 18 U.S.C. § 371.

[2] He pleaded guilty below.

Appendix B

Since the principal contention of these defendants is that the Government produced insufficient evidence to sustain these convictions it is necessary to delineate at length pertinent portions of the protracted testimony. This is particularly important in conspiracy cases. The "facts" must of course be evaluated in the light of the jury's guilty verdict.

The Company operated an established general printing business in Newark, New Jersey. Romeo Mattia was the owner. He was tried and acquitted. His son Joseph was manager. He was convicted and is one of the defendants here. The Company employed about thirteen persons full time including three of these defendants: viz., Raio, who was a printing press operator; Mancinelli, who was an offset pressman; and Perna, who was print shop foreman. The fifth defendant here is Natale, who was not a regular employee of the Company. He had full time employment as foreman of the negative plate department of another printing establishment. On a sporadic basis when the Company needed extra help or was busy he would work for it in the evenings after regular working hours and on weekends. On these occasions Natale mainly did photographic work, which is a step in the photo offset process. At such times he was paid the going overtime rate of pay, about $5.00 per hour. His income from the Company for all of 1961 was $300.

The fact that the bonds here involved were counterfeit was fully established. One of the crucial issues at the trial was whether the counterfeit bonds were made at the Company's plant. The record discloses that the Government's evidence strongly justified a jury finding that the counterfeit bonds were printed at the Company's plant. The Com-

pany's bookkeeper (Adler) so testified in the Government's case. Also, by way of example only, a questioned documents examiner for the F. B. I. testified that the serial numbers of a sampling of the seized bonds were printed by identified numbering machines which were delivered to a Company representative on December 12, 1961. One of the identified machines was seized by the F. B. I. at the Company's plant incidental to the arrest of the Mattias. Moreover, a thumbprint of one of these defendants Mancinelli, was found on one of the seized bonds. It was also shown that the particular bond could not have been handled by him in connection with the investigation.

We next consider whether the Government properly "linked" these defendants with the printing of the bonds. The key Government testimony as proof of the alleged overt acts came from Adler. He was employed by the Company as a bookkeeper during the period when the counterfeit bonds were printed, i.e., between August and December 1961. Defendants attacked Adler's character at the trial. While relevant, it merely went to the weight to be given his testimony, particularly in view of the other evidence adduced by the Government.

Adler testified that while working evenings in late September of 1961 he would have occasion to go to the rear of the print shop to discuss estimates with Joseph Mattia who was working with the defendants Raio and Perna. He said he heard them discussing "how they were going to go about making the bonds, the printing of the bonds." Adler said he saw Raio and Natale stripping, or laying out, the bond material which was to be photographed. He said Raio was doing the photography work and Natale was making the negatives. Adler testified that

the actual printing of the bonds on the offset machines commenced in the latter part of November 1961. In this connection he said that defendant Mancinelli operated the offset press while Perna ran the numbering press. He stated further that the Mattias were present while these runs were being made. These operations at first were only in evenings but later also took place during the day.

We think the Government's evidence clearly justified a finding by the jury that all of these defendants worked on some one or more stages leading to the printing of the bonds.

We next consider whether the Government's evidence properly justified a finding that these defendants were aware that they were engaged in a counterfeiting operation. Such a showing was needed to satisfy the necessary element that they had a conscious purpose to further the conspiracy.

The defendant, Joseph Mattia, who managed the plant, was identified by Adler as the man who handled the contact with Segal, the individual who attempted to use the counterfeit bonds to secure a loan. Joseph Mattia on occasion brought the GMAC bond negatives in from the plant to show Segal. It was Joseph Mattia who instructed Adler to misfile the invoices for the paper used in printing the bonds. After an investigative visit of the F. B. I. agents in early 1962 he issued a threat to certain of these defendants and Adler that dire consequences would result if anyone talked about the printing of the bonds. This evidence fully justified a finding that Joseph Mattia participated with full knowledge of the wrongful purpose of the operation.

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We next consider the evidence on this score against the defendants Raio and Natale. Adler testified that he saw Raio doing the photography work on the bonds while Natale was making the negatives. The full significance of this testimony can only be realized when considered in conjunction with the mechanics by which these counterfeit bonds were made.

An expert witness for the Government, whose company makes GMAC's bonds, testified that authentic GMAC bonds are printed by the engraving process. In contrast, he stated that the bonds here were made by lithographic printing, which means that a negative plate is prepared by photographic means. He detailed the various steps in the printing of these bonds. First, a genuine bond is photographed. This is done in portions to get all the detail and to separate the colors. The portions are then pasted on a piece of transparent material until a composite picture is obtained. The material is then placed on a photo-sensitive plate. Light is passed through to the negative plate which then contains the desired picture. Three such plates were necessary here. These plates are then used in the press which actually prints the counterfeit bonds.

From the outline of the steps leading to the preparation of the negatives to be used in the printing of these bonds it is evident that Raio and Natale were fully conscious that they were preparing negatives of an authentic bond. They of course were aware that such negatives could be used to make copies by the lithographic method. Certainly it was a fair inference that they knew the plates were to be used in the plant to make copies.

We think the expert's testimony fully justified a finding that Raio and Natale were conscious participants in the

creation of counterfeit bonds. This conclusion is given further support as to Raio by Adler's testimony that Perna and Raio just shook their heads when he told them at an early stage in the operation that they were crazy for making bonds.

We next consider evidence of the defendant Perna's knowledge of the illicit nature of the activity. He of course operated the press on which the bonds were numbered. Adler testified that he heard Joseph Mattia discuss with Perna how they were to go about making the bonds. Perna also did not react when, early in the operation, Adler told him he was crazy to make the bonds. The Government's evidence was ample to justify the conclusion that Perna was conscious that he was participating in a wrongful project.

We come finally to Mancinelli, a full time employee of the Company. It was his fingerprint which was found on one of the seized counterfeit bonds. He operated the offset press which actually printed the bonds. The Government's expert testified that in order to print one of these bonds it would have to pass through the lithographic press three times, "Once for the purple on the face, once for the purple on the back, and once for the black text on the face." Of course, at this stage the bonds were not numbered but did contain signatures of certain agents of GMAC.

The jury was justified in concluding that Mancinelli knew he was making copies of an executed bond and that the negatives had been made in the Company's plant. When this is considered in the setting of this Company's operation and his necessary association with the activities

of the others involved in this project, we think the Government made a sufficient case for jury consideration of Mancinelli's guilty participation.

We thus conclude that the evidence fully justified the jury in finding that all these defendants purposefully joined in an agreement to commit an unlawful act.

But these defendants argue that a criminal conviction cannot be sustained because there was no proof of an agreement to commit an offense against the United States. Thus, they argue that the Government's proof is not sufficient to prove beyond a reasonable doubt that an agreement existed among the conspirators to transport these bonds with fraudulent intent in interstate commerce.

It is true that there is no "direct" proof that these defendants intended that the bonds be transported in interstate commerce, but necessarily that is often a matter of inference in such cases. Here the bonds were printed in New Jersey with a provision that they were to be paid upon maturity in New York. From this provision the jury, which had the bonds before it, was reasonably justified in inferring that these defendants were aware that at some point they might be expected to become a part of interstate commerce. Certainly their connection with the various steps demonstrates that they had much more than a mere mechanical connection with the operation. Thus, all could fairly be charged by the jury with knowledge of such provision in view of the expert witness's testimony as to how the bonds were made. Nor is the identity of the Company named as the obligor in the bonds irrelevant to this issue in view of the evident interstate nature of its operation.

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We are satisfied that the evidence properly supported the trial court's refusal to take the case from the jury at the close of the Government's case. Moreover, the defendants' evidence merely posed the issues for the jury and did not warrant a directed verdict. We are satisfied from the evidence and the law that the jury was fully justified in convicting these defendants of the offense charged.

These defendants next contend that the court erred in refusing to instruct the jury as follows:

> "29. Although one may become a member of a conspiracy without full knowledge of all the details of the conspiracy, a person who has no knowledge of the conspiracy, but happens to act in a way which furthers some object of the conspiracy does not thereby become a conspirator."

The trial judge refused to give this instruction because he stated that he had given it as part of the main charge. Defendants say that nowhere did the court charge the jury that if a defendant had no knowledge of a conspiracy's existence he should be acquitted even though his conduct could be found to have furthered the conspiracy. The Government contends that the trial court in substance did charge the appellants' theory of defense. Thus, it points out that the court charged that "If the parties acted together to accomplish something unlawful a conspiracy is shown." Again, for example, the court said:

> "27. In every conspiracy there must be proof beyond a reasonable doubt that the persons named therein did knowingly participate and knowingly commit some act in furtherance of the objects of the conspiracy . . . ."

We think the trial court's instructions covered the substance of defendant's requested charge and that no error was committed.

Finally, the defendants contend that the court erroneously charged that if the defendants violated 18 U.S.C. § 2314 they could be found guilty of conspiracy. Defendants say they could be found guilty of the substantive offenses without being guilty of a conspiracy. Since they were indicted only for conspiracy, defendants say it would appear from the charge that the jury could have erroneously convicted them of a crime other than the one for which they were indicted. Passing over the fact that no objection was made to the charge in the trial court, we think the court made it clear that it was talking only in the context of the conspiracy charge when he said to the jury:

> "When defendants are charged with conspiracy, it is necessary to first establish the unlawful combination, that is, the sole offense with which these defendants are charged."

We find no error in the charge of the trial court.

We conclude that the judgment of conviction of these defendants must be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix B

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,810

UNITED STATES OF AMERICA,

vs.

JOSEPH MATTIA, GERARD A. PERNA, JOHN RAIO,
FRANK MANCINELLI

JOSEPH MATTIA, Appellant.

(D. C. Criminal No. 483-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and SEITZ, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 24, 1965, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

June 29, 1967